

**RULE OF LAW AND SUSTAINABLE DEMOCRACY
CONCERNED PROFESSIONALS
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I. Introduction

I would like to begin by thanking the Concerned Professionals for hosting this event and for inviting me here today. It is a privilege and an honor to have the opportunity to speak with you today, and especially to have such august and able commentators. I also thank the U.S. State Department and the U.S. consulate here in Lagos for its support of this program, although my comments represent only my own views, not those of the United States government or of the consulate. Finally, thanks to all of you for attending.

I have been asked to discuss Rule of Law and Sustainable Democracy. First, let me first say what today's talk will *not* be. I am not here as a foreign expert who advocates exporting my legal system into your country. Only you have the requisite knowledge, experience, and sensibilities to determine the compatibility of certain elements of rule of law and democracy into Nigeria's legal, social, and political climate. What I hope is that today's session will provide the beginning of a dialogue that I hope will continue in the months and years to come.

Achieving rule of law, democracy, and development is not an easy task, nor is it something that can be achieved easily or quickly. It has taken the United States more than 200 years to develop and the U.S. is still a work in progress. I hope that some of the lessons that we have learned in our long struggle for democracy can assist you as you move Nigeria forward.

Your country is blessed with abundant natural and human resources and with a rich cultural heritage. And through its constitution, international treaties, and other laws, Nigeria has committed itself to the long and arduous process of democratization. Nigeria's constitution demonstrates the country's commitment to democracy and the rule of law with sweeping statements about principles of good government, principles of freedom, equality, and justice. For all these reasons, Nigeria has all the essential elements to become a thriving economic and political force in the 21st Century. To be sure, it is a major challenge, but also a wonderful opportunity for today's people to be the founders of a new era of Nigerian democracy.

II. Definitions

At the outset, there are challenging definitional issues. What is rule of law? What is sustainable democracy? Both terms are ubiquitous and hard to define; they are

imbued with ambiguity and complexity, and they can mean many different things. And although they are different terms with different connotations, there is substantial overlap between them.

Rule of Law

In essence, rule of law refers to having rules that are established, known accepted, and respected – by both government and non-government actors. Rule of law invokes a predictable legal system with fair, transparent, and effective judicial institutions to protect citizens against the arbitrary use of state authority and lawless acts. Rule of law also implies a set of procedures and processes for the resolution of disputes that are accessible and fair to all. Rule of law is considered to be a cornerstone of a well-functioning democracy. A society built on rule of law promotes stability and order; the absence of the rule of law provides fertile ground for corruption. Rule of law provides confidence in the legal system and its ability to enforce its promises.

Democracy

Democracy is most often associated with free, fair, and regular elections with universal or near universal right to vote, in which more than one political party actively participates. I prefer a more functional definition of democracy – one that includes not just formal political processes such as elections – important as they are; one that also embraces the notion of reciprocity – between the government and the governed, and a general sense of trusteeship – that government exists for the common benefit. If that trust is broken, then the accountability mechanisms of democracy are called into play to demand a government that does provide for the public good.

A democratic system is marked by principles of equality for all, regardless of gender, religion, class, or race.

As such, notions of rule of law and democratic institutions go hand in hand. It is not possible to have a thriving rule of law without sustainable democracy – such a rule of law would lack the confidence of the public necessary to survive. And democracy without rule of law likewise would be fragile and without credibility.

What I would like to do today is to share with you some thoughts about aspects of democracy and rule of law I think are critical. These elements are of course drawn largely from my own experience – the American experience and experience that, as I suggested earlier, may not be fully adaptable to or appropriate for your system.

Elements

I will focus my remarks today on 7 specific elements of good governance that I see as essential to the development of democratic rule of law. There are of course many others that I could discuss, but I hope that these will give us a useful starting point for this dialogue. They are:

1. Free, fair, competitive, and periodic elections;

2. Transparency and accountability in government;
3. A criminal justice system that protects due process rights;
4. A free and robust press;
5. Rules that promote property ownership, investment and development;
6. An independent judiciary with the authority and ability to protect these rights; and
7. An educated and civic minded public.

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I would like to say a little about each of these elements.

1. Free, Fair, Competitive, and Periodic Elections

The trademark of any thriving democracy is the presence of free, fair, competitive, and periodic elections for the selection of representatives chosen by the people.

Suffrage should be near universal, subject only to limited exceptions, say for people below a certain age, or those who are mentally incompetent. And the goal of universal suffrage must be a reality, not simply a formality to be disregarded at the polling station. Certainly the American experience provides some fodder for this discussion. For almost 70 years, we denied blacks the right to vote. Even after the right of blacks to vote was enshrined in our Constitution, there were numerous, often successful, efforts to disenfranchise black voters – and allegations of impropriety at polling places continue to this day. The experience of women in the U.S., who were finally given universal suffrage rights in the early part of the twentieth century, has been less dramatic but also instructive.

The electoral process must also be fair. Rules and regulations need to be developed – and enforced -- that provide for a level playing field for those vying for elected positions. Access to the media, to public funds, and to other election mechanisms should be provided on an equal basis.

The elections themselves must be fair and transparent. Polling places should be available and accessible to voters, and they must be free of intimidation. Voting should be done by secret ballot, and votes must be tabulated honestly. Independent commissions or monitoring groups should be created or invited to ensure that elections are carried out as intended.

Elections must be periodic and are to occur at reasonable intervals. Periodic elections promote public accountability. Elections should also be at intervals established by law; this ensures that those already in power cannot manipulate the timing of elections.

Voter education is essential. The public must understand its rights and how to execute and enforce them. This concept will be discussed later when I talk about the need to develop a civic society engaged in public matters.

The presence of competitive political parties is an essential element of the electoral process, and there should be freedom to organize and join political parties. Among other things, parties recruit and nominate candidates for elected office, develop positions on issues of public concern, stimulate public discourse, formulate governing platforms during election campaigns, and ultimately will form the government or the opposition. These elements are essential to a thriving and sustainable democracy. The credibility and legitimacy of particular political parties will be determined by their performance during the election process and in office, if elected.

2. Transparency and Accountability in Government

Government must be transparent, which means that government policies and practices must be subject to scrutiny by the press and the public. I do not know of, nor can I imagine, a government in the world that can achieve true accountability without transparent government operations. In the United States, we have certain laws that require the government to open its processes to the public. The two most prominent of these laws are freedom of information laws and sunshine laws. Both of these were adopted in the wake of confidence lost in our federal government during the Nixon years.

Freedom of information laws allow any interested person to seek information about how the government reached any specific decision. Of course our federal Freedom of Information Act (known as FOIA) has some exceptions, some of which have been subject to bitter judicial proceedings. But in general, the public has a right to see the back up, if you will, of government action. In recent years, FOIA and similar state laws have been modified to instead require government agencies to publish much of what would have been available through FOIA electronically, given the broad access we have in the U.S. to the internet. Sunshine laws similarly seek to open government processes to the public but in this case by requiring that government meetings be held open to the press and the public – again, with some exceptions.

There are a plethora of other laws that promote good governance and diminish official corruption. Let me name a few for your consideration. To the extent that Nigeria does not have a set of laws to this end set in place, law reform commissions might be established to consider their prompt development and implementation. They are:

- Ethical standards for all government employees, including codes of conduct, financial disclosure laws, lobbying laws, laws that limit gift giving to officials, and laws to govern conflicts of interest and *ex parte* communications.
- Procurement laws – government contracting must be transparent so as to ensure that government work projects are done most efficiently and fairly. Government projects should not be allocated on the basis of cronyism or bribes. Everyone should have an opportunity to bid for such projects and to have bids awarded pursuant to fair, even-handed, and established rules.
- Civil service laws – most un-elected government positions should be filled on the basis of a civil service exam that all are eligible to take, and jobs should be allocated fairly based on government need and performance on the exam and other objective criteria. Government cronyism perpetuates inefficiency and lack of accountability and promotes corruption. It also provides for very unstable

government services. A well-regulated civil service means that there remains a cadre of highly-qualified and experienced people in government positions, regardless of the next election results.

- Whistleblower statutes – legal protections should be developed for so-called whistleblowers – those who report impropriety of government officials. In the U.S., statutes exist to protect and even encourage such persons to come forward.

An important corollary to laws promoting transparency is the presence of public audit agencies or ombudsman offices to monitor compliance with these laws and those who are subject to them.

Perhaps most important is the development of a culture of good governance, a culture of government legitimacy. This is possible only when a State is able to begin to attract and recruit the best and the brightest and the most dedicated people to run for elective office; when those offices offer the promise of promoting society's goals rather than one's own personal interest; when those offices are imbued with respect and prestige -- because they are worthy of such respect and prestige.

3. A Criminal Justice System that Protects Due Process Rights

It has been said that the measure of a society's commitment to its people is how it treats those accused of criminal activity.

Again, drawing on the American experience, which throughout its history has struggled with these concepts, here are some of the elements that we consider to be fundamental to rights of those who find themselves in the criminal justice system.

First, no one's home can be broken into and searched by the police without a court order that there is good cause for such a search. There are of course exceptions for exigent circumstances, but the basic rule is that there must be good cause – and that good cause most often must be proven to a judge. The same general principles apply to the search of a person's car or person. What happens if the police do not follow this procedure? Under what we call the exclusionary rule, any evidence found as a result of an illegal search will be excluded from a trial against that person. This rule goes further, and provides that any evidence discovered as a result of an illegal search will likewise be excluded from trial – the “fruit of the poisonous tree” doctrine. In certain cases, a person whose rights have been so violated may have a civil action against the offender. Taken together, this set of rights provides freedom from arbitrary searches by law enforcement officers and removes from the police any incentive to violate these rights.

The same rule applies with respect to a person's right not to incriminate himself. You may be familiar with the so-called *Miranda* warnings that must be provided upon arrest. If the police fail to advise a person of his right to remain silent and the person makes a confession or otherwise implicates himself, such evidence will not be permitted at trial.

When a person is arrested, he has the right to be told the charges pending against him, and this must be done within a very short time after being arrested. In addition to a statement of the charge or charges pending, a person must appear before a judge within a day or two of arrest. If the judge does not find that there is probable cause to hold the person for the stated charge or charges, he will be released immediately.

If the person is held, he is entitled to a bail hearing to determine whether he can be released pending trial. In any event, an accused is required to be brought to trial quickly. The trial must be open to the public in all but the most limited of circumstances.

At trial, the defendant has an additional set of rights. These include the right not to testify, the right to confront witnesses against him, the right to compel the presence of witnesses to testify on his behalf, the right to a trial by jury, and the right to have an attorney. These last two elements require some further discussion.

As for the right to a jury trial: In the U.S., the right to a jury is a strong tradition, grounded in our Constitution. In respect of the jury, we have become more English than the English! What I mean by this is that there is a right to a trial by jury in the U.S. in almost every criminal and almost civil trial. There is not ample time today to debate the relative merits of the jury system in civil or criminal cases, and certainly reasonable people can disagree on that issue. But specifically with respect to criminal trials, the jury has been said to be an important symbol that a defendant is getting a fair trial. The active participation of layman in the criminal justice process gives the defendant a sense of fair play, and gives the public a better understanding of the system, which in turn enhances the credibility of the process.

The right to an attorney has been an important complement of the criminal justice system in the United States, and for the past 50 years or so has been interpreted to require that criminal defendants be provided legal representation free of charge if they cannot afford to hire an attorney. This has leveled the playing field to some extent – though imperfectly -- for poor defendants, and has led to the emergence of a vibrant criminal defense bar and related organizations in the United States. Again, the presence of these attorneys who answer only to their clients gives enhanced credibility to our criminal processes. These attorneys, who form a powerful bar in the U.S., not only serve individual defendants but have also served to highlight publicly some of the problems in our criminal justice system.

Prison reform is also an area to be considered. Are the conditions of imprisonment humane? If not, corrective action should be taken. This is not only a matter of basic human rights for those who are incarcerated; it is also a way of making rehabilitation a more important aspect of the penal system. If prisoners are completely dehumanized, we cannot really expect them to return as productive members of society.

4. A Free and Robust Press

It almost goes without saying that a free and robust press is essential to rule of law and democratic development. Even with the most transparent and accountable

laws, there can be no effective mechanism for the protection of rights without a vigilant press.

The press must be free. It cannot be an arm or extension of the government. It cannot be subject to undue interference or control by the government so that it may report freely and openly on matters of concern – including problems within the government. This is the only way to have a truly informed citizenry – one that can petition the government for redress or prompt a change in those who govern. Without a free and open press, government malfeasance can go unnoticed and thus unrectified.

To give a recent example from the U.S.: You may have heard that after hurricane Katrina there was an outburst in the press about the performance of FEMA – the Federal Emergency Management Agency. Although President Bush at first was firm in his support of Michael Brown, the director of that agency, the virulent press attacks on the President for ineptness and cronyism ultimately led to Brown's removal from his post. I am not at all certain that the same result would have occurred without the vigilance of the press in bringing to the attention of the public the incompetence with which the situation was handled.

Finally, a free and open press can promote public discourse and dialogue on issues of public concern. It is by open and free discussion and debate that the merits and drawbacks of specific actions and positions can be brought to light.

5. Rules that Promote Property Ownership, Investment and Development

As United Nations Secretary General Kofi Anan said, “[g]ood governance is perhaps the single most important factor in eradicating poverty and promoting development.”

First, secure property rights provide the certainty and confidence that will encourage investments. If I am looking to invest financially in a market by, say, building a textile factory, would I be more likely to develop that factory in a state where my property and other commercial rights are clear and enforceable? A country that has procedures in place that can assure me of clear title to my land? A country that has reasonable and knowable market entry regulations? Or in a country rampant with corruption in which my property rights depend on the whim of particular government bureaucrat? A country in which my land can be appropriated by the government? A country in which there will be no effective enforcement mechanism if my property rights are compromised? The answer is of course obvious. So investment will flow much more readily in the state in which my investment will be protected by well-defined rules as part of a legal system that will apply those rules forcefully and neutrally.

A similar theory applies to the improvement of property.

For much the same reason, the protection of intellectual property rights – the right to the expression of creative ideas and inventions – will spur creative activity. If owners of such property are not assured the fruits of their labors, incentives to engage in creative thinking will decline.

Second, rule of law creates an economic environment in which investment is possible. Financial institutions will loan money only if they are confident that the loan can and will be repaid or that property can be seized in satisfaction of the loan. Secure ownership of property constitutes collateral that can be used to incur debt to permit development.

Property rules must provide for free use of ownership, use, and transference. Real property rights must be secured by a land title and registry system that can adequately title, record, and map assets. Reliable title guaranty services should be developed so as to identify any prior mortgages, liens, judgments, or other encumbrances. Reliable physical surveys and plat maps of property must be developed so that there is a clear basis of owner entitlement. Government regulations should not be so extensive as to discourage those who might want to enter the market. And strong property laws should be accompanied by laws on contract, tort, corporate organization and governance, labor regulation, monetary policy, financial markets, antitrust, and trade.

6. An Independent Judiciary with the Authority and Ability to Protect These Rights

An independent judiciary is perhaps the single most important institutional safeguard of the rule of law. The independence of the judiciary from political pressures is an essential aspect of justice at any level. Judges must be dedicated and conscientious that the rights of parties are not compromised by illegal or illegitimate considerations. Judicial salaries must be high enough to attract able jurists and to avert the lure of corruption; and the judicial branch should have adequate funding to carry out its functions efficiently and effectively, always in manner that inspires the public confidence. Your great Justice Oputa was quoted as saying as follows:

Our constitution speaks audibly and eloquently of Freedom, Equality and Justice. But a clash may occur between constitutional ideals and political and social realities. Hence there is a need for an umpire or referee to settle the ensuing disputes. The courts play that important role. It is only the judiciary which can, in the final analysis and as the last resort, translate the dreams of Nigeria Our ... Supreme Court ... can translate into actuality the noble ideals expressed in our Fundamental Law and give flesh and blood – in fact life – to the abstract concepts like Freedom, Liberty, Equality and Justice clearly articulated and reiterated in our constitution.

The judiciary also needs to have rigorous enforcement powers so as to give “teeth” to its rulings. All – including top government officials -- must understand that they are bound by the law.

The judiciary must have sufficient resources in order to fulfill its function, and judges must have decent living and working conditions. The judges’ work must be supported by a capable administrative staff.

If appropriate, alternative forms of dispute resolution should be developed so that parties can choose the dispute resolution forum that best suits their needs and the

nature of the dispute. Arbitration and mediation procedures may provide excellent recourse in certain situations.

Other instruments of transparency should be developed consistent with what has become known as “due process.” Just to give some examples from the American experience: court proceedings that are in all but the most unusual circumstance open to the press and the public; and judicial decisions that are published and readily available, and that contain a statement of the reasoning of the court.

7. An Educated and Civic Minded Public

I now reach the final point: the need for an educated and civic minded public guided by brave, educated people. If you have been asking yourselves throughout this talk, “how do we accomplish any of these objectives?,” the answer I offer is that “it begins with the people of Nigeria.”

The people at large need to know and understand their rights. Education must begin very early – and continue through old age. Primary school education should include courses on civic duty. If it does not, it should be added. If it cannot be added, then interested parents and community leaders should take it upon themselves to make such lessons available on an extra-curricular basis, and such lessons should continue throughout a child’s education. Adult lessons in civility should be offered so that those who do not receive a formal education and those who have already reached maturity do not constitute a generation lost to their civic duty. The more educated the citizenry about what they can and should expect from their governments, the more pressure the leaders will feel to conform.

The beginning of dialogues across this country will inevitably result in the development of associations of like-minded individuals, created around profession, or interest in a specific interest – for example, media rights, student groups, human rights, women’s groups, minority rights organizations, business and labor organizations, environmental groups – the list goes on and on. Along with the press, such groups can be vigilant watchdogs over the operation of the government and call government actors to account for perceived improprieties. One such important group from my personal perspective as an attorney is a fearless bar because of the unique position of lawyers in society and their access to the instruments of justice.

In short, the people must be willing participants in defining and maintaining democratic institutions and rule of law principles. They cannot be spectators; they must be the driving force. And their participation must take the form of a continual engagement and spirited democratic discourse. An educated, informed, and interested citizenry begins with you – the leaders of the business community – who can help make this dream for Nigeria a reality.